

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

76-6097 ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
F. W. EVERSLEY & CO., INC., & F. W.
EVERSLEY & CO., INC., on behalf of
itself and all other persons entitled
to share in funds allocated for the
improvement of real property owned by
The East New York Non-Profit H.D.F.C.,
INC.

Plaintiff-Appellee,

- against -

CARLA A. HILLS, Secretary to the United
States Department of Housing and Urban
Development, THE EAST NEW YORK NON-PROFIT
H.D.F.C., INC., and THE EAST NEW YORK
SAVINGS BANK,

Defendants,

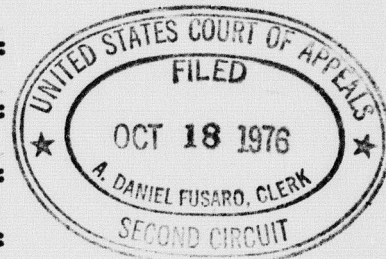
CARLA A. HILLS, Secretary of the United
States Department of Housing and Urban
Development,

Defendant-Appellant
-----X

Docket Nos. 76-6097,
76-6099

B

P/S



AMICUS CURIAE BRIEF
IN SUPPORT OF PLAINTIFF-
APPELLEE, F. W. EVERSLEY
& CO., INC.

UNITED STATES COURT OF APPEALS
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AMICUS CURIAE BRIEF
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Development, :

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PRELIMINARY STATEMENT

This brief is submitted amicus curiae by the Sub-
contractors Trade Association, Inc. in support of F. W.
Eversley & Co., Inc., plaintiff-appellee.

The Association consists of approximately 400 of
the major subcontractors and suppliers in the metropolitan
New York City area. Many of its members were the sub-

contractors and suppliers who participated in the construction of the subject housing premises. They as well as others subcontractors and suppliers provided the bulk of the work and materials which made the housing possible for the tenants who now occupy the two projects. These subcontractors and suppliers have not been fully paid and they would be the beneficiaries of the affirmants of the judgments which have been granted and entered below in favor of the plaintiff-appellee. If such monies are not eventually recovered by them, then the financial disaster which has overtaken the construction industry generally in the metropolitan area will have been seriously aggravated.

SUMMARY OF ARGUMENT

The Association adopts the argument of the plaintiff-appellee herein. To the extent that the monies recoverable under the judgment below are payable to EVERSLEY, the fund thereby produced will inure to and constitute a trust fund for the subcontractors and suppliers of EVERSLEY, pursuant to Article 3-A of the Lien Law of the State of New York.

POINT I

THE REVERSAL OF THE JUDGMENTS BELOW
WOULD WORK AN UNJUST ENRICHMENT OF
THE GOVERNMENT AND THE HOUSING COM-
PANIES AT THE EXPENSE OF EVERSLEY
AND ITS SUBCONTRACTORS

As observed by Judge Werker below, the 1968 amend-

ments to the National Housing Act sought to promote the production of housing for low and moderate income families. Section 236 of the National Housing Act provided for assistance to the mortgagee on behalf of the mortgagor with resulting reduction of interest costs on the mortgage and, in addition, the construction lender was given protection against all risks of default. The entire program inextricably involved the United States Department of Housing and Urban Development in the provision of the financing of the various projects and the ultimate execution of the construction plans. Ultimately, approval by HUD of final completion was a condition for the final payment to be made to the general contractor. Judge Werker confirmed the view that the housing companies were the "creatures of HUD". These housing companies had no funds of their own and consequently EVERSLEY and its subcontractors had been led to believe that they could look to payment for the work done by them to HUD. Judge Werker concluded that the housing companies were simply instruments "for the convenience of the government in effectuating the Section 236 program."

In view of the foregoing circumstances, HUD and/or the banking institutions were, in effect, permitted to acquire the completed projects at substantially less than

their actual value and thereby become unjustly enriched at the expense of EVERSLEY and its subcontractors. Inasmuch as the differentials which would have made EVERSLEY and its subcontractors whole exist in the form of escrow funds and retainages withheld by the respective banks, equity commands that an equitable lien be placed upon those funds and retainers.

American Fidelity Fire Insurance Company v. Construcciones Werl, Inc., 407 F. supp. 164 (D.V.I. 1975).

POINT II

EVERSLEY AND ITS SUBCONTRACTORS ARE BENEFICIARIES OF THE TRUST FUND PROVISIONS OF THE LIEN LAW OF THE STATE OF NEW YORK

The EVERSLEY brief explores at length the salutary purposes of the trust provisions of the Lien Law of the State of New York (Lien Law, Sections 70 et seq.) and the applicability of such provisions to the case at bar. It would be a needless affectation of research for this amicus curiae brief to reiterate the authorities in support of that position. As amicus, therefore, the Association endorses and concurs in the views expressed in the EVERSLEY brief.

POINT III

EVERSLEY AND ITS SUBCONTRACTORS
ARE THIRD PARTY BENEFICIARIES
OF THE BUILDING LOAN AGREEMENTS

As in Point II above, the reiteration of the authorities cited in the EVERSLEY brief would add nothing to the excellent exposition of the authorities therein. It is suffice to respectfully direct the attention of this Court to the well-established principles of law that recovery may be had on a contract by those persons who are intended beneficiaries of such contract.

German Alliance Insurance Co. v. Home Water Supply Co.,
226 US 220, 230; Pearlman v. Reliance Insurance Co., 371
US 132, 138.

CONCLUSION

The judgments below should be affirmed.

Respectfully submitted,

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New York, New York 10017

Of Counsel,
Irwin M. Taylor

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

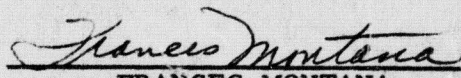
FRANCES MONTANA, being duly sworn, deposes and says:
Deponent is not a party to the within action, is over 18 years
of age and resides in the State of New York.

On October 12, 1976, deponent served the within AMICUS
CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE, F. W. EVERSLEY &
CO., INC. upon the following:

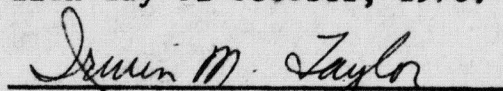
ROBERT B. FISKE, JR.
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Southern District of New York,
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New York, New York 10019,

the address designated by said attorneys for that purpose by
depositing a true copy of same enclosed in a post-paid properly
addressed wrapper, in an official depository under the exclusive
care and custody of the United States Postal Service within the
State of New York.


FRANCES MONTANA

SWORN to before me this
12th day of October, 1976.


Notary Public

IRWIN M. TAYLOR
Notary Public, State of New York
No. 31-9294090
Qualified in New York County
Commission Expires March 30, 1978